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AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Separation of Powers

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**Field v. People of the State of Illinois, ex rel. McClernand, 3 Ill. 79** (1839)

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*The Jacksonian Era witnessed the development of two distinct constitutional conceptions of the relationship between the chief executive and other executive officers. Most Democrats maintained that executive officers were subordinate to the president or governor. Andrew Jackson and his political allies maintained that the chief executive of the nation was constitutionally authorized to give orders to and remove all other executive branch officials. Most Whigs maintained that some executive branch officials were independent of the president or governor. Henry Clay and his political supporters maintained that the secretary of the treasury did not have to follow presidential orders and could not be removed by the president without congressional permission. Jacksonians won the debate at the national level in the debate over the removal of federal deposits from the Bank of the United States, although the matter would not be decisively settled until the twentieth century. Presidents after Andrew Jackson expected cabinet members to be loyal to their program and subject to removal at their will. State practice was more varied. Many states, as* Field v. People of the State of Illinois, ex rel. McClernand *(1839) illustrates, adopted executive branch practices more consistent with the Whig conception. In many states, executive branch officials were partly autonomous from one another and their term of office did not depend entirely or at all on the good will of the governor. These are known as plural rather than unitary executive systems, and some states later entrenched these practices into their constitutions by creating executive offices that were elected separately from the governor.*

*Alexander P. Field, a Whig, was the Illinois secretary of state during the 1830s. The state constitution specified that the secretary of state was nominated by the governor and confirmed by the senate. Neither the constitution nor statute specified a term of office or outlined a specific procedure for removal. Thomas Carlin, a Democrat, was elected governor of Illinois in 1838. Upon assuming the governorship, Carlin nominated John McClernand, a Democratic legislative leader, to be the new secretary of state. Contending that the governor could not remove the existing secretary of state, the Whigs and a small group of Democrats in the state senate successfully blocked McClernand's nomination. After several failed nominations, the governor waited until the legislative session ended and then named McClernand as the acting secretary of state. Field refused to relinquish the office. He sought a judicial ruling supporting his position. The trial judge, Democrat Sidney Breese, ruled in favor of the governor. Field appealed that decision to the state supreme court.*

*The state supreme court reversed and ruled that Field had a right to remain the secretary of state. The court split on party lines, with two Whig justices supporting the secretary of state and the lone Democratic justice supporting the governor (with a third Whig justice recusing himself).* Field v. People, ex rel. McClernand *is a leading judicial opinion defending the "weak governor" view of executive power. Reflecting the constitutional views of the Whig party, the Illinois Supreme Court in Field construed the inherent powers of the executive very narrowly and minimized the role of the governor as a chief executive.* Field *provides an indirect Whig response not only to the U.S. Supreme Court's decision in* Ex Parte Hennen *(1839) (which held that the U.S. Constitution implicitly allowed superior officers to remove inferior officers at will, unless otherwise specified) but also to Andrew Jackson's "Protest of the Censure Resolution."*

*After winning the state elections of 1840, the Democrats packed the state supreme court (one of the new judges was future U.S. Senator Stephen Douglas). Field was again removed from office, and this time McClernand was easily confirmed. In 1870, the Illinois state constitution was revised to give the governor an explicit power of removal.*

CHIEF JUSTICE WILSON delivered the opinion of the Court.

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. . . . In deciding who is entitled to the office of secretary, it becomes necessary to decide whether the governor of this state possesses the constitutional power of dismissing from office the secretary of state, and appointing a successor, at his will and pleasure. . . .

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The first enquiry, then, is, can the power claimed by the governor be implied from the . . . provisions of the constitution? That other powers than those expressly granted, may be, and often are, conferred by implication, it is too well settled to be doubted. Under every constitution, the doctrine of implication must be resorted to, in order to carry out the general grants of power. A constitution can not, from its very nature, enter into a minute specification of all the minor powers, naturally and obviously included in, and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one, or the performance of the other. . . .

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The arguments in favor of the governor's power of removal, in the extreme cases of official abuse of trust by the secretary, auditor, and treasurer, that are instanced, apply with equal force to other officers.

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. . . [D]oes policy sanction a concentration of power in the hands of one man, to be used at discretion? This doctrine is contrary to the opinions of the ablest writers on government, and is also opposed to the constitution, which has divided and subdivided the powers of government, and as far as practicable, made one a check upon another. And upon the principle that arbitrary, discretionary power is more liable to abuse than that regulated by law, the constitution has made the law, and not the will of the executive, the rule to which all its officers are bound to conform and to which they are amenable.

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The injunction, that the governor shall see that the laws are faithfully executed, it is also urged, gives him the control, and consequently the power of removal of the officers of the executive department. This inference is not justified by the premises. . . . The executive is to see the laws executed, not as he may expound them, but as they may be expounded by those to whom that duty is entrusted. To the legislature is delegated the authority to make the law, to the courts the authority to expound them, and to the executive the authority to see them executed, as they are thus interpreted. . . .

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But this question is settled by the adjudication of the highest judicial tribunal in the nation. In the case of *Marbury* v. *Madison* (1803), the supreme court of the United States decided, that where the duty of an officer is prescribed by law, he is bound to conform to the law, and not to be guided by the will of the president. . . .

. . . . And as the president can not . . . control the secretary of state in the performance of a duty enjoined by law, it follows, conclusively, that the governor's title to such a power over the secretary of this state, must be equally invalid; and as he has no right to direct him how he shall perform the duties assigned him, he can have no right to dismiss him for a non-compliance with an unauthorized assumption of authority. As he has no right to command, he has no title to obedience.

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According to the theory of our government, the people are the sovereign power. All officers are created and administered for their benefit and convenience, and not for the benefit or convenience of the chief magistrate. All the officers of government derive their authority directly or indirectly from the people; and an officer who is to execute or administer the laws, is not less an officer of the people, nor more an officer of the executive, or the legislature, because the people have declared by the constitution that he shall receive his appointment through their instrumentality. In making the appointment, they act as the agents of the people, but when that act is performed, their agency and authority ceases. . . .

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JUSTICE LOCKWOOD, concurring.

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What is a public office? Is it not a public trust, created for the purpose of promoting the public good? What qualities in the officer are requisite to enable him properly to discharge his official duties? Are not intelligence, integrity, faithfulness, and experience essential? In whom are these combined qualities most likely to be found—in the novice, or in the man of experience? In the man just come into office, or the man who has been long enough in office to have gained a thorough knowledge of its duties? Will, then, the public gain by clothing the executive with power to remove its officers at his will and caprice? . . .

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. . . Does that provision of the constitution, which requires that the governor "shall take care that the laws be faithfully executed," empower him to remove the secretary, or any other officer, at his will and pleasure? . . . All that the constitution contemplates is, that the governor shall exercise a general oversight over the operations of the laws, and use such means, as the laws have placed in his hands, to overcome opposition, and remove obstacles to their due enforcement. If the laws be defective, or inefficient, it would doubtless be his duty to inform the legislature of such defects, and point out proper remedies. If the laws be opposed by force, it would be his duty, as the chief executive of the state, to call out the militia to aid the civil officer to put down such opposition. . . . I think the governor will find full scope for his vigilance, in taking "care that the laws be faithfully executed." Should the secretary, or any other officer, neglect or refuse to perform his duty, the laws possess sufficient energy to compel compliance, without resorting to the, power of removal. If the secretary refuses, or neglects, to perform any official duty, he may be impeached. He may also be compelled to perform the duty, by *mandamus*. If he, or any other officer, act partially or oppressively, from a malicious or corrupt motive, it is a fundamental principle of our government, that he may be punished, by a criminal prosecution. . . .

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JUSTICE SMITH, dissenting.

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This section of the United States constitution received a contemporaneous exposition in 1789, by the first congress which assembled under that constitution. . . . The question of the power of the president to remove was debated at large, and settled, after an animated contest, by the passage of the bill in favor of the existence of the power in the president. . . .

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. . . . [S]uch has been the settled and undisturbed rule ever since the formation of the government, up to the present time, that as "the constitution mentions no power of removal by the executive department, of any of the officers of the United States, and as the tenure of office of none except those in the judicial department is declared to be during good behavior, it follows, that all others must hold their offices during the pleasure of the president, unless in cases where congress has provided some other duration of office." . . .

If, however, a possible doubt could have remained, it must have been dissipated by a recent decision [*ex parte Hennen* (1839)] of the supreme court of the United States, in which the power of removal from office was directly presented to the court for its determination; and in which the court refer to the contemporaneous expositions given to this section of the constitution of the United States, by congress, on the power of removal from office by the president of the United States. . . .

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. . . . [A]s the state constitution was adopted in the year 1818, thirty-one years after that of the United States, it is a fair legal inference, that by that adoption, it was intended to adopt the construction given to that from which it was taken, and to which it is in so many essential parts entirely analogous. . . .

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